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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 263

SCHULIM WIXMAN, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA.

Brief of American Jewish Congress as Amicus Curiae in Support of Petition for Writ of Certiorari.

Preliminary Statement.

With the consent of the parties, the American Jewish Congress respectfully submits this brief, as *amicus curiae*, in support of the petition for a writ of certiorari in this case. The American Jewish Congress is an organization composed of American Jews, organized in part ". . . to safeguard the civil, political, economic and religious rights of Jews everywhere" and ". . . to help preserve, maintain and extend the democratic way of life." The activities of the American Jewish Congress have never been confined to the interests of Jewish people alone. It believes that the struggle for human freedom is part of the substance of the Jewish tradition.

In this case the courts below have denied naturalization to an alien on the basis of assumptions which limit the freedom of speech and thought of all non-citizens. We believe that those assumptions reflect growing anti-alien

attitudes in this country. Historically, such attitudes, both in this country and abroad, have always been associated with the impairment of democracy in all its aspects. It is because anti-alien feeling is inseparable from every other kind of repression that we submit this brief.

Questions Presented.

The trial court denied petitioner's application for naturalization on the ground that he had failed to prove that he was "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States" as required in Section 307(a) of the Nationality Act of 1940 (8 U. S. C. 707(a)) [R. 290].

This brief is addressed to the question whether an applicant for naturalization, a college teacher by profession, who in a public speech analyzes the merits and faults of various economic systems and who appears to favor a collectivist or socialistic society (without advocating or favoring its imposition by force or violence) is debarred from obtaining citizenship.

Statement of the Case.

Petitioner's application for naturalization was denied by District Judge Paul J. McCormick on the ground that, upon all the evidence, petitioner had not "sustained the burden of proof which is imposed upon him . . . that he is now attached to the principles of the Constitution of the United States and well disposed towards the good order and happiness of the American people and of the people of the United States" [R. 290]. The Circuit Court of Appeals for the Ninth Circuit affirmed this decision solely on the ground that the burden of proof in naturalization proceedings is on the petitioner [R. 38].

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Petitioner is uniquely qualified by education, background and temperament, to receive the privileges of citizenship and to become a useful citizen. He was born in the Ukraine in 1900 and came to the United States with his mother at the age of 11 [R. 177]. The family migrated to New Haven, Connecticut and there petitioner attended public school and Yale University [R. 177]. He graduated from Yale in 1923, his education having been interrupted while he served in the United States Army during the First World War [R. 177-178]. He was honorably discharged from the service [R. 178].

While in the army petitioner filed certain papers which were later established to be a declaration of intention to become a citizen. Following the filing of these papers, he and other non-citizen soldiers were called together and an oath was administered to the group by someone in the military establishment [R. 178]. He was told that this completed the formalities of becoming a citizen [R. 185]. Thereafter, believing himself a citizen, he conducted himself as such, voting in national elections and otherwise assuming the privileges and prerogatives of citizenship [R. 179]. In 1940, when matters of citizenship again became a subject of concern and inquiry because of the National Emergency, petitioner addressed a request to governmental agencies for a certificate of naturalization [R. 179]. He then learned that he had not completed all the formalities during the First World War and was not eligible for a certificate of naturalization [R. 179]. He forthwith voluntarily cancelled his voting registration and filed a new petition for naturalization [R. 179-180].

After graduating from college, the petitioner served for a time as instructor in history and economics at the University of California [R. 179] and thereafter, from 1929

to 1940, taught economics and history at the Los Angeles City College, a state supported institution affiliated with the University of California [R. 179]. During World War II petitioner was active in USO and Civilian Defense [R. 215]. Since he resigned from his teaching position at City College in 1941, he has served in responsible capacities for various Jewish communal organizations, first as field representative for the Hillel Foundation of the B'nai Brith, and at present as Executive Director of the Jewish Personnel Relations Bureau, a subdivision of the Los Angeles Jewish Community Council [R. 184].

Petitioner married a native-born American citizen 21 years ago and has a son of college age who was born in the United States [R. 233].

It has never been contended, and the government does not suggest, that petitioner is a member of, affiliated with or sympathetic to the Communist Party or of any other organization advocating the overthrow of our government by force or violence.

We shall not attempt here to describe in detail the evidence presented by petitioner or the government in the trial court, since the rulings of the District Judge sufficiently indicate the manner in which the question stated above is raised. The Judge's opinion [R. 280-290] was devoted chiefly to a lecture given by petitioner in 1934 which was one of a series of faculty lectures at the college and was attended by about 100 persons [R. 5-25, 190, 210]. The Judge also relied to some extent on the testimony of two professors who served with petitioner on the

City College faculty and one or two students who attended petitioner's classes [R. 280]. He found insufficient evidence of loyalty in the testimony of 49 witnesses called by petitioner, including nine former colleagues, judges, doctors, lawyers, business men, and neighbors and officers of veterans organizations, all of whom had known petitioner for long periods of time and recommended him for citizenship [R. 289].

The Judge concluded that petitioner "was a collectivist and was advocating that theory of political philosophy" [R. 281; see also R. 284, 290], and that in the 1934 lecture he did not present "the sort of a picture that should be presented by a teacher of the youth of America during a time of travail and distress" [R. 286; see also R. 289, 290]. He found that "one who holds up that sort of a picture cannot be said to be well disposed towards the good order and happiness of the American people" [R. 286]. With respect to the question of academic freedom, he said, "The instructor should be a stimulating instructor, as one of the witnesses stated, but he should stimulate adherence to the American principle of life and not to some foreign ideology that is entirely alien to the make-up of the United States" [R. 290].

Argument.

I.

The courts below were clearly in error in denying naturalization solely on the ground that petitioner "advocated" social and economic change.

From the days of the Founding Fathers, it has been recognized that our democracy does not require a slavish adherence to the existing social and economic system nor inhibit the advocacy of political change. Thomas Jefferson said in his inaugural address:

> "If there be any among us who wish to dissolve this Union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[1]

That basic concept has been repeatedly reaffirmed by this Court:

> ". . . but freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."
>
> *Board of Education v. Barnette*, 319 U. S. 624, 642 (1943).

> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty."
>
> Brandeis, J. dissenting in *Whitney v. California*, 274 U. S. 357, 377 (1927).

> "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth."
>
> *Thornhill v. Alabama*, 310 U. S. 88, 95 (1940).

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[1]Writings, Vol. 8, pp. 1, 3.

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Protection of the right to advocate economic change is of most vital importance today when we are confronted with an increasing intolerance of minority views on all fronts. As one prominent student of civil liberties has recently said, in periods such as the present, the courts can and should "set up standards to which the followers of freedom can repair."[2]

Thus, it would be important and timely for the Court to consider this case even if the questions were presented *de novo*. However, it seems clear that the decisions below are in direct conflict with this Court's opinion in the *Schneiderman*[3] case. That case represents the latest and most authoritative definition by the court of a statutory requirement of "attachment to the principles of the Constitution." The opinion leaves no room for doubt in its holding that such a statute does not require "attachment to any particular provision or provisions." It emphasizes the error of the prevailing belief that "one who advocates radical change is necessarily not attached to the Constitution."[4] It specifically holds that one who advocates socialization of the means of production, to be brought about by changes in the Constitution, does not thereby violate the statutory test.[5]

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[2]Grenville Clark, *Civil Liberties: Court Help or Self Help, Constitutional Rights,* Edited by Herbert F. Goodrich, American Academy of Political and Social Science, 1938, p. 7.

[3]*Schneiderman v. United States,* 320 U. S. 118 (1943).

[4]320 U. S. at 137-138.

[5]*United States v. Rovin,* 12 F. 2d 942 (D. C. Mich., 1926).

Despite the clear pronouncement by this Court in the *Schneiderman* case, there has been great uncertainty and confusion among the lower Federal courts as to the meaning of "attachment to the principles of the Constitution." Although some courts have held that a desire for economic and social change does not indicate the absence of attachment to the principles of the Constitution,[6] other lower courts have said that those who advoate change by amendment of the Constitution are not so attached.[7]

The unusually restricted view of the statute taken by the District Judge here is revealed by his conclusion that special limitations must be placed on the admission to citizenship of those in the teaching profession. Thus he stated at the hearing that "so far as this court is concerned, it is not going to admit persons to citizenship who are teachers, concerning whom this court feels there is any lack of attachment to the principles of the Constitution of the United States" [R. 236]. We submit that it is particularly odious to demand that teachers eschew all independent

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[6] 320 U. S. at 141.

[7] *In re MacKay*, 71 F. Supp. 397 (D. C. Ind., 1947);
In re Saralieff, 59 F. 2d 436 (D. C. Mo., 1932);
Cf. United States v. Tapolcsanyi, 40 F. 2d 255 (C. C. A. Pa., (1930).

For further evidence of the confusion among the lower courts, see:

In re Skoglund, 46 F. Supp. 434 (D. C. Minn., 1942);
Allan v. United States, 115 F. 2d 804 (C. C. A. 9th, 1940);
In re Val Lae Ken, 22 F. Supp. 145 (D. C. Cal., 1938);
In re Olson, 4 F. 2d 417 (D. C. W. D. Wash., N. D. 1925);
Ex parte Sauer, 81 Fed. 355 (D. C. Tex., 1891);
Cf. Petition of Maikert, 67 F. Supp. 36 (D. C. Pa., 1946);
Cf. Schwab v. Coleman, 145 F. 2d 672 (C. C. A. 4th, 1944).

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thought in the political field and avoid expressions which might raise doubts concerning their orthodoxy.

A review of the instant decision is needed, if for no other reason, in order to clarify the law and to settle the uncertainty prevalent in the lower federal courts.[8]

Conclusion.

The question here presented is whether an alien may be denied entry into the ranks of citizens because of a critical evaluation of our economy resulting in a desire for economic change.

In opening the ranks of our citizenry to the alien who has had sufficient courage and interest in the welfare of his fellow man to study and evaluate the *status quo* and believes it can be improved within the framework of the democratic process, "we have nothing to fear, except fear itself." If we bar citizenship to all who believe in free discussion of economic and political change, we restrict the "free market place of ideas" necessary to progress and the development of the nation. As this Court once stated: "Compulsory unification of opinion achieves only the unanimity of the graveyard."[9]

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[8]That uncertainty is in no small part due to the fact that the appellate courts occasionally permit only a very narrow scope to their review of District Court decisions in naturalization cases. Thus the Circuit Court of Appeals here appears to have felt that its powers of review were so limited that it could not interfere even with an obvious application of purely personal considerations on the part of the District Judge. There is a clear need for reexamination by this Court of the question whether the scope of review in naturalization cases is indeed so limited.

[9]*Board of Education v. Barnette*, 319 U. S. 624, 461 (1943).

The American Jewish Congress earnestly supports the petition in this case and urges grant of a writ of ceriorari by this Court.

Respectfully submitted,

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